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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT HAROLD McKINNEY, Defendant and Appellant.	E053233 (Super.Ct.No. FSB701325) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Melissa Mandel and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Two teenage boys affiliated with the Delmann Heights gang were walking down a street in San Bernardino when a man pulled up next to them in a car and fired two shots. One of the boys was struck and killed. The other boy hopped a wall and escaped; he gave a series of three statements to the police, in which he claimed that he could not identify the shooter, then gave a fourth statement, identifying defendant as the shooter. Defendant was a member of the rival 18th Street Maze gang.

Almost a year later, in Louisiana, defendant and his girlfriend, LaToya Thompson, were arrested for selling marijuana. Thompson told the Louisiana police that defendant had told her about a shooting he had committed in San Bernardino. At the preliminary hearing, she claimed that she lied to the police, because they threatened to arrest her and to take her children away. She did not testify at trial; the trial court found that she was unavailable. Thus, her preliminary hearing testimony was read into the record, and her statement to the police was then admitted as a prior inconsistent statement.

Defendant's first two trials resulted in hung juries. In his third trial, the jury found defendant guilty on one count of first degree murder (Pen. Code, §§ 187, subd. (a), 189) and one count of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)). On both counts, the jury found a firearm enhancement (Pen. Code, § 12023.53, subds. (c) [as to attempted murder] & (d) [as to murder]) and a gang enhancement (Pen. Code, § 186.22, subd. (b)) true.

Defendant was sentenced to a total of 85 years to life in prison, plus the usual fines and fees.

Defendant now contends that:

1. The trial court erred by admitting the surviving victim's identification of him as the shooter, because it was the product of an impermissibly suggestive identification process.

2. The trial court erred by finding that Thompson was unavailable.

3. The trial court erred by admitting Thompson's statement to the Louisiana police, because it was coerced.

4. The trial court erred by admitting printouts of what was allegedly defendant's MySpace page.

5. There was insufficient evidence of the "primary activities" element of the gang enhancements.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *The Shooting*.

On April 11, 2007, victims Donta Brooks[1] and Jarrett Ojomoh were visiting Ojomoh's girlfriend at the Dorjil apartment complex (known as the Dorjils) in San Bernardino. Both of them were associated with the Delmann Heights gang.

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[1] The spelling of Brooks's first name is uncertain. It also appears as "Dante," "Donte," "Dontae," and "Dont'a." He was not asked to spell it at the third trial.

Around noon or 1:00 p.m., they left and started walking east on 19th Street. Ojomoh was wearing a red jacket or sweatshirt.

Two cars pulled up next to them, one behind the other. The car in front was a gold Honda. The car in back was black; the windows were rolled up and tinted, so Brooks could not see inside.

Brooks could see into the gold car, however. He recognized the driver as defendant. He knew defendant from school. He was aware that defendant was associated with the 18th Street Maze gang. However, he believed that he and defendant were "cool," because two weeks earlier, they had shaken hands.

Then Brooks saw a handgun next to the driver's seat. Defendant said, "What's up?" and lifted his head in a certain way. At that point, Brooks knew he was going to "get shot at." He said, "Oh, shit" and started running east. Looking back, he saw Ojomoh running west. Brooks jumped over a wall. As he hit the ground, he heard two shots. He then ran to a nearby school.

The police found Ojomoh's dead body inside an apartment in the Dorjils. He had died of a single bullet wound in the lower right side.

Sergeant Darryl Scott, a school police officer, interviewed Brooks at the school. Brooks told him about being shot at, but, he admitted at trial, he lied about the circumstances. He explained that it was the "code of the street [that] you just don't give up information" to the police. That would be snitching, and a snitch "might get beat up [or] killed . . . ." In addition, he did not want to give Ojomoh's name, because Ojomoh

had been carrying some "weed." At that point, he did not know that Ojomoh had been hurt.

Brooks told Sergeant Scott that he and a friend had been walking along when a white car pulled up next to them. There were two men inside, one White and one Black. One of the two men, he was not sure which, pointed a gun at him.

Officer Johnny Macias of the San Bernardino Police Department also interviewed Brooks at the school. Brooks told Officer Macias that he had been walking with a friend named Tommy. There were two cars, one white and one black. A Black male, in his late teens or early 20's, pointed a gun at him; it looked like a TEC-9. Brooks heard a shot, then ran. He said he did not think the shooting was gang related.

Later that day, at the police station, Detective Pete Higgins of the San Bernardino Police Department interviewed Brooks a third time. Brooks still did not know that Ojomoh had been hurt. Thus, he continued to lie.

Once again, Brooks said his friend's name was Tommy. He said the shooter was a Black male, but he did not see his face; he only saw his hand on the gun. However, he also said the shooter was aged 18 to 25. He claimed he saw the shooter point the gun at him and his friend. He identified the gun as a TEC-9.

At the end of the interview, Detective Higgins told Brooks that Ojomoh was dead. Brooks became "visibly shaken and upset."

Detective Higgins interviewed Brooks a fourth time at "Trevia's house" in Canyon Lake.[2] Brooks appeared to be afraid. This time, according to Brooks, he told the truth. He gave a statement that was essentially consistent with his testimony at trial.[3] Detective Higgins showed him a photo of defendant, and he identified it as the shooter.

B. *Defendant's Arrest and Thompson's Statement*.

In March 2008, police in Monroe, Louisiana arrested defendant for selling marijuana. Initially, defendant identified himself as "Montae Taylor."

The Louisiana police interviewed defendant's girlfriend, LaToya Thompson. A tape of the interview was played at trial.

Thompson told police that she knew defendant as Robert Johnson.[4] She had met him in July 2007 at a club in Monroe. He told her that he was wanted for murder in San Bernardino, California.

One night, when they were alone in bed, he admitted to her that he had killed someone. He said he was from the Blackrag Mafia Maze gang; "they had been beefing and . . . he had killed the dude."

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[2] Trevia Davis was Ojomoh's mother. She lived in Canyon Lake. Brooks and Ojomoh lived in a separate house in Canyon Lake, paid for by Davis. Although they were not biologically related, Brooks considered Ojomoh to be his brother and Ojomoh's mother to be his mother.

[3] He continued to claim, however, that the gun looked like a TEC-9 and that he saw it in the shooter's hand. He also said that he heard the first shot as he was climbing over the wall and the second shot after he got over the wall.

[4] Defendant's mother's name was Ann Johnson.

He explained that, one night, he was in a car, and "two dudes [were] walking down the street . . . ." He got out of the car and told them, "[C]ome [h]ere." "[W]hen they turned around and looked at him[,] they started running and they jumped over the wall. One of the dudes did not make it [']cause he got shot." He got rid of the gun. He then took a bus to Louisiana.

The morning after he told her this, she told him he had no conscience. He agreed, adding, "I'm not a normal human being."

Thompson's testimony at defendant's preliminary hearing was read into the record. In it, she stated that she met defendant at a club in Monroe in December 2006. She denied that defendant ever talked to her about killing anybody. She admitted telling the Louisiana police that he did, but only because they "threatened to take [her] kids away and take [her] to jail for 25 years to life . . . ."

Thompson claimed that everything that she told the police came from an article in a local Monroe newspaper that she read after defendant was arrested. However, her statement to the police included facts that were not in the article, such as that defendant was in the Maze gang and that he called the victims over to the car. She also said that there were two victims, although the article had mistakenly said that there were three. On the other hand, her statement also included facts that differed from Brooks's testimony — she said that the shooting happened at night and that defendant got out of the car.

C. *Gang Evidence*.

According to Sergeant Travis Walker, a gang expert, defendant was a member of the 18th Street Maze gang. His moniker was "Lil Gotti." He had tattoos on his right and left arms reading "Maze" and "Life," respectively. His MySpace page included photos of 18th Street Maze members, some throwing gang signs. It also included 18th Street Maze slogans. Sergeant Walker admitted, however, that he did not have any field interview cards for defendant.

According to Sergeant Walker, the primary activities of 18th Street Maze included murder, attempted murder, assaults with a deadly weapon, witness intimidation, and drug sales.

A pattern of gang activity was shown by the following predicate offenses:

1. In May 2006, two members of 18th Street Maze committed a drive-by shooting; they fired over 30 rounds and succeeded in killing the intended victim.

2. In January 2007, the same two members of 18th Street Maze committed a shooting and attempted murder; the intended victim was believed to be responsible for a previous shooting of a member of 18th Street Maze.

Originally, 18th Street Maze was affiliated with the Crips, so it used the color blue. After about 2004, however, younger members started using the neutral color black and the name "black rag." A few even aligned with a Blood set and used the color red.

18th Street Maze and Delmann Heights were rival gangs. Delmann Heights is a Blood gang, so it used the color red. The graphics on defendant's MySpace page included the letters "DHBK," which stood for "Delmann Heights Blood killer."

In addition, Edward "Lil 9" Griffin and Michael "Lil Mike" Johnson, who were members or associates of 18th Street Maze, had been shot and killed by members of the Little Zion Manor gang. In their memory, defendant got tattoos reading "RIP Edward" and "RIP Michael." Defendant sent emails stating that he was going to "put it down for . . . Lil 9" and "put it down for Lil Mike . . . ." The Little Zions were a Blood gang; they claimed the area just across 19th Street from the Dorjils.

In Sergeant Walker's opinion, a shooting of a rival gang member in a rival gang's territory would "benefit not only the status of the gang member himself but the gang . . . ."

II

BROOKS'S IDENTIFICATION OF DEFENDANT

Defendant contends that the trial court erred by admitting Brooks's identification of him as the shooter, because it was the product of an impermissibly suggestive identification process.

A. *Additional Factual Background*.

The following facts are taken from the factual statements in defendant's motion in limine and the prosecution's opposition. (Those statements were apparently based on the evidence at the first trial, which is not before us.)

When the police first interviewed Brooks, he said he did not get a good look at the shooter and could not identify him. Next, when Detective Higgins interviewed him, Brooks likewise said that he could not identify the shooter, although he did give an age range. At that point, Brooks did not yet know that Ojomoh had been struck and killed.

The next day, Ojomoh's mother contacted Detective Higgins. She said that Brooks had told her that the shooter was "Rob," who had attended San Bernardino High School with him in 2004-2005, who was a member of the Maze gang, and whose mother's name was Ann Johnson. Detective Higgins discussed this information with another detective, who said that Brooks's description matched defendant.

Detective Higgins checked the high school's records, which indicated that defendant had attended the school in 2004-2005 and that his mother's name was Angela Johnson. The school records included a photo of defendant. In the background of the photo, there was a palm tree.

Detective Higgins then reinterviewed Brooks at Ojomoh's mother's home. At first, Brooks maintained that he did not see the shooter. Ojomoh's mother, however, took him aside and talked to him. Brooks then told Detective Higgins that he did see the shooter. He confirmed that the shooter was "Rob," who had attended San Bernardino High School with him in 2004-2005 and who was a member of the Maze gang.

At that point, Detective Higgins showed Brooks the photo of defendant. Brooks identified it as a photo of the shooter. Detective Higgins explained that he used the single

photo instead of a "six-pack" because Brooks had indicated that he knew defendant and also because the palm tree would have made the photo suggestive in any event.

B. *Additional Procedural Background*.

1. *The second trial*.

Prior to the second trial, defendant filed a motion in limine to exclude evidence that Brooks had identified him or would identify him as the shooter, arguing that "the prior identification . . . was . . . unduly suggestive . . . and . . . any subsequent in[-]court identification is based on that unduly suggestive identification . . . ." The prosecution filed a written opposition.

After hearing argument, the trial court ruled that the evidence was admissible. It explained: "[T]he witness knew the defendant or a[t] least indicated that he knew the defendant and . . . the photograph was obtained through information obtained from the witness . . . . Actually it was for purposes of confirming the identification that previously had been made by the witness himself . . . ."

2. *The third trial*.

Before the third trial, defense counsel stated that he wanted to "incorporate" certain previous motions in limine, specifically including the motion to exclude Brooks's identification. However, there was no argument on the motion, and the trial court never ruled on it.

C. *Analysis*.

1. *Forfeiture*.

Defendant's contention stumbles out of the gate because defense counsel forfeited it by failing to obtain a ruling on it at the third trial.

"'[A]bsent a ruling or stipulation that objections and rulings will be deemed renewed and made in a later trial [citation], the failure to object bars consideration of the issue on appeal. . . . A defendant may not acquiesce in the admission of possibly excludable evidence and then claim on appeal that rulings made in a prior proceeding render objection unnecessary.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1002.)

Here, defense counsel arguably did object by asking to "incorporate" the prior motions in limine. However, he failed to press for a ruling or to obtain one. "In order to preserve an issue for review, a defendant must not only request the court to act, but must press for a ruling. The failure to do so forfeits the claim. [Citations.]" (*People v. Ramirez* (2006) 39 Cal.4th 398, 472-473.)

2. *Merits*.

We also reject this contention on the merits.

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances,

taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.]

"The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.) A claim that a pretrial identification procedure was unduly suggestive is subject to our independent review. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

"[A]lthough a one-person showup may pose a danger of suggestiveness, such showups 'are not necessarily or inherently unfair. [Citations.] Rather, all the circumstances must be considered.' [Citation.]" (*People v. Medina* (1995) 11 Cal.4th 694, 753.) Indeed, "single-person show-ups *for purposes of in-field identifications* are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.]" (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 387.)

Here, Detective Higgins showed Brooks the photo shortly after the shooting.[5] At that point, it was important to get an identification from Brooks, if possible, while the shooting was still fresh in his mind. Moreover, in light of the description that Brooks had given the victim's mother, defendant was already under suspicion; it was important to rule him in or out. The fact that Brooks was apparently familiar with defendant, because they had gone to the same school, made the identification less suggestive. (See *People v. Harris* (1985) 175 Cal.App.3d 944, 958-959 [where witness had seen both defendants a number of times in her neighborhood, courtroom identification was not an impermissibly suggestive one-person showup].)

Moreover, Brooks had not yet given the police any description of the shooter (except for an age range). Thus, the police were not in a position to prepare a standard six-pack of persons who all matched a certain general description. The best that Detective Higgins could have done would have been to prepare a six-pack of people who matched *defendant's* description. However, because Brooks evidently already knew defendant, that would, in itself, have been suggestive.[6]

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[5] At trial, Detective Higgins testified that the interview took place "a couple of days" after the shooting. Earlier, at the preliminary hearing, he had testified that it took place two days after the shooting.

[6] At trial, Detective Higgins did not give this as one of his reasons for not preparing a six-pack. However, that evidence was not before the trial court when it ruled on defendant's motion in limine. In any event, the officer's "subjective motive for conducting the interview in the way he did is irrelevant: The question is whether the technique that he used is objectively reasonable." (*Pace v. City of Des Moines* (8th Cir. 2000) 201 F.3d 1050, 1057.)

As defendant notes, there is no evidence that Detective Higgins gave (or did not give) a cautionary admonition before showing Brooks the photo. However, the burden of proving that the procedure *was* suggestive is on *defendant*. Thus, absent evidence to the contrary, we may presume that the police did not present the photo in a suggestive manner. (See *In re Carlos M., supra*, 220 Cal.App.3d at p. 386 ["[t]he record is devoid of any indication that police told the victim anything to suggest the people she would be viewing were in fact her attackers"].) We conclude that the procedure was not impermissibly suggestive.

Finally — and again, separately and alternatively — even assuming the procedure was suggestive, the identification was nevertheless reliable under the totality of the circumstances. Brooks knew defendant. By stating that the shooter was "Rob," a member of the Maze gang, who had gone to San Bernardino High School in 2004-2005, and whose mother's name was Ann Johnson, Brooks essentially identified defendant as the shooter before even seeing his photo. There was no evidence of any other person who met this description. While Brooks had failed to identify defendant in previous interviews, that was most likely due to intimidation, not a genuine failure of recollection. Brooks identified the photo within days after the shooting.

We therefore conclude that the trial court did not err by admitting Brooks's identification of defendant.

III

THOMPSON'S UNAVAILABLILITY

Defendant contends that the trial court erred by finding that Thompson was unavailable.

A. *Additional Factual and Procedural Background.*

1. *The first trial.*

Before the first trial, defense counsel objected to Thompson's preliminary hearing testimony based on *Crawford v. Washington* (2004) 541 U.S. 36 (124 S.Ct. 1354, 158 L.Ed.2d 177). The trial court ruled that the testimony was admissible, provided the prosecution made a foundational showing that Thompson was unavailable.

Thus, on February 4, 2009, the trial court held an evidentiary hearing under Evidence Code section 402. The only witness was Jose Guzman, an investigator for the district attorney's office.

According to Guzman, Thompson was living in Louisiana. She had testified at the preliminary hearing only after a warrant had been issued for her arrest. After the preliminary hearing, Guzman told Thompson that she would have to return for the trial. She told him she would cooperate, because she did not want "to go through the arrest . . . and warrant process" again.

On January 20, 2009, the prosecutor asked Guzman to contact Thompson. Thus, he spoke to her on January 20 and again on January 26. Both times, she was very cooperative.

Sometime between January 26 and 30, Guzman learned that Thompson was going to avoid returning to California for trial. He then spoke to her mother, her grandmother, her sister, her niece, and her nephew.

On January 30, he obtained a warrant for her arrest. The local Louisiana sheriff's department sent surveillance teams to Thompson's home, her workplace, and her relatives' workplaces, but they were unable to locate her. Meanwhile, Guzman tried to phone her "every day, about two, three times a day . . . ."

The trial court ruled that the prosecution had exercised due diligence.

2. *The second trial*.

On October 7, 2009, prior to the second trial, the trial court held a new Evidence Code section 402 hearing with regard to Thompson's unavailability. Once again, the only witness was Guzman.

Guzman testified that, after the first trial, he continued to try to locate Thompson. He did "want/warrant checks, driver's license [checks], [and] FBI checks," but found nothing.

He also enlisted the aid of the local Louisiana sheriff's department, which "spent over two weeks, 100 man hours, contacted over 15 family members, [and] checked approximately 10 different locations . . . ." The local deputies learned that there were several local warrants for Thompson's arrest. They were "99 percent sure" that Thompson was staying at her mother's house. For example, her welfare checks were

being sent to that address and were being cashed. However, they were never able to find her there.

One day before the hearing, the deputies told Guzman that Thompson may have fled to Alabama. A relative provided two possible addresses in Alabama. Guzman immediately contacted the local Alabama district attorney's office. The chief investigator there checked out the two addresses and found that they were not valid; however, he identified a third address where Thompson might be staying with a relative.

Once again, the trial court ruled that the prosecution had exercised due diligence.

3. *The third trial.*

On February 14, 2011, prior to the third trial, the trial court held yet another Evidence Code section 402 hearing with regard to Thompson's unavailability. This time the only witness was Mark Cordova, an investigator with the district attorney's office who had taken over the case from Guzman.

Cordova testified that, from Guzman's notes, he understood that Thompson was either in Monroe, Louisiana or in Alabama.

On February 2, he contacted Thompson's grandmother. She said that Thompson was still in Monroe, and she would have Thompson contact him. However, Thompson never did.

He also checked on Thompson's California driver's license and learned that it had been surrendered in Georgia.

On February 4, Cordova contacted the local Louisiana sheriff's office. Local deputies were sent out to contact Thompson four times over the next 10 days. They checked her grandmother's house, her mother's house, and a third possible location,[7] but without success.

Cordova admitted that he did not check any welfare records or use any "skip trace methods."

Yet again, the trial court ruled that the prosecution had exercised due diligence. Accordingly, at trial, Thompson's preliminary hearing testimony was read into the record, and her statement to the police was admitted as a prior inconsistent statement.

B. *Analysis.*

"'"The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. [Citations.] That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made 'a good-faith effort' to obtain the presence of the witness at trial." [Citations.]

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[7] They learned that, in September 2010, Thompson had been listed in a police report as the victim in a domestic violence case. One of the addresses they checked was also the address listed in the domestic violence police report.

"""In California, the exception to the confrontation right for prior recorded testimony is codified in [Evidence Code] section 1291, subdivision (a), which provides: 'Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' A witness is unavailable if '[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.' [Citation.] Although [this] refers to 'reasonable diligence,' th[e Supreme Court] court has often described the evaluation as one involving 'due diligence.'" [Citation.]' [Citation.]

"' . . . [T]he term "due diligence" is "incapable of a mechanical definition," but it "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." [Citations.] Relevant considerations include "'whether the search was timely begun'" [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation].' [Citation.] 'When, as here, the facts are undisputed, a reviewing court decides the question of due diligence independently, not deferentially. [Citation.]' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 674-675.)

"'The proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable.' [Citation.]" (*People v. Valencia* (2008) 43 Cal.4th 268, 292.)

Defendant argues that the search started too late, particularly as it was become clear that Thompson was trying to avoid testifying. Ten days, however, was plenty of time to find a witness who was not trying to avoid being found. Reasonable diligence findings have been upheld when the search for the witness started seven days, six days, four days, and even as little as one day before trial. (*People v. Saucedo* (1995) 33 Cal.App.4th 1230, 1238-1239, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)

And if Thompson *was* trying to avoid being found, starting earlier would not necessarily help. Before the second trial, when she heard the prosecution was looking for her, she fled to Alabama. Moreover, even if she were located some weeks or months before trial, the prosecution would have to either subpoena her or have her arrested as a material witness. (Pen. Code, § 1334.3, subd. (a).) If she were subpoenaed but not arrested, she could disregard the subpoena and flee. (See *People v. Louis* (1986) 42 Cal.3d 969, 992, fn. 6 ["[i]n light of [the witness's] undisputed and indisputable unreliability, mere service of process does not and cannot satisfy the requirement of due diligence here"], disapproved on other grounds in *People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9.) And if she were arrested, she could argue that she was being detained for an unreasonable period of time before trial. (Cal. Const., art. I, § 10; *In re Francisco M.*

(2001) 86 Cal.App.4th 1061, 1077.) In other words, the prosecution was damned if it started too early and damned if it started too late.

In *People v. Fuiava*, *supra*, 53 Cal.4th 622, the Supreme Court held that the prosecution showed due diligence, even though it first began searching for a witness approximately two weeks before trial. (*Id*. at pp. 674-677.) It observed: " . . . '[W]e could not properly impose upon the People an obligation to keep "periodic tabs" on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply "disappear," long before a trial date is set.' [Citation.]" (*Id*. at p. 676.) This reasoning applies here.

Defendant relies on *People v. Avila* (2005) 131 Cal.App.4th 163. There, however, the witness had willingly testified at a previous trial. The prosecution did not attempt to recontact her until the day the retrial was to begin; an officer went to her only known address but was unable to find or contact her there. (*Id*. at p 167.) The appellate court stated: "Waiting until the morning a trial begins to try to locate a witness after being out of touch for several months is generally not prudent or reasonable, and certainly is not an untiring effort to secure a witness's presence at trial. [Citation.] Witnesses have jobs, they plan vacations [citation], they have child-care responsibilities, they leave town for a few days. A party who wanted to ensure a witness was available to testify would usually plan ahead, and not wait a day or two before the testimony was needed." (*Id*. at p. 169.) It acknowledged, however: " . . . If they feared she might be uncooperative and refuse to

appear, then waiting until the morning the trial began arguably had merit. [Citation.] But if the People had no reason to think she would try to avoid service, then waiting until the '11th hour' to contact her the morning trial started was not due diligence. [Citations.]" (*Id*. at p. 170.)

Here, the prosecution allowed enough time to deal with vacations and child care responsibilities. However, because there was reason to think that Thompson might be uncooperative and refuse to appear, there was a risk in starting too early.

Next, defendant argues that leads were not competently explored. He faults Cordova for relying on the local sheriff's office. However, inasmuch as Thompson was in Louisiana, there was not much else he could do. Somewhat inconsistently, defendant complains about the fact that Cordova checked California driver's license records. Admittedly, this was not likely to be fruitful, but it makes our point — that Cordova acted reasonably in delegating most of the legwork to the officers in Louisiana. Defendant does not specify anything that those officers supposedly should have done but did not do.

Defendant also complains that Cordova failed to use skip-tracing or welfare databases. However, as the Supreme Court has also stated, "the circumstance that 'additional efforts might have been made or other lines of inquiry pursued does not affect th[e due diligence] conclusion. [Citation.] It is enough that the People used reasonable efforts to locate the witness.' [Citations.]" (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 677, fn. omitted.)

Defendant argues that Thompson's testimony was very important. We may so assume. Nevertheless, the prosecution's efforts to locate her were reasonably commensurate with her importance to the prosecution's case. In the end, the prosecution failed to find her because she was determined to avoid testifying, not because it conducted an inadequate search.

Finally, defendant argues that the prosecution did not do enough to prevent Thompson from going missing. He cites *People v. Roldan* (2012) 205 Cal.App.4th 969, which stated: "[T]he requirement of due diligence is not limited to situations in which the prosecution is trying to find a witness who has gone missing. '[N]o less important "is the duty to use reasonable means to *prevent a present witness from becoming absent*." [Citation.] If the prosecution fails in this latter duty, it does not satisfy the requirement of due diligence. [Citation.]' [Citations.]" (*Id*. at p. 980.)

The prosecution, however, is not required to assume that a witness will become unavailable. The prosecution has a duty to prevent a witness from becoming absent only if it is on notice that this is reasonably likely. For example, in *Roldan*, when the witness testified at the defendant's preliminary hearing, he was on an immigration hold; after the preliminary hearing, he was released to federal authorities and deported. (*People v. Roldan*, *supra*, 205 Cal.App.4th at p. 976.) The court held that the prosecution failed to exercise due diligence to prevent the witness from becoming absent. (*Id*. at pp. 980-985.)

Similarly, in *People v. Louis*, *supra*, 42 Cal.3d 969, the witness was in custody on felony charges; he refused to testify against the defendant's alleged coperpetrators unless,

after he testified, he was released for a weekend on his own recognizance. (*Id*. at pp. 977-978, 990.) The prosecution was aware that the witness "habitually failed to make court appearances and had to be arrested to compel his attendance . . . ." (*Id*. at p. 989.) The prosecutor even admitted, " . . . 'In my mind there was a very real possibility that the man would boogie, that he wouldn't show up. . . . I thought there was a real risk that he would not.'" (*Id*. at p. 992, fn. omitted.) Nevertheless, the prosecution agreed to his release. The witness "promptly disappeared"; thus, he was not present to testify at the defendant's trial. (*Id*. at p. 978; see also *id*. at p. 990.) The Supreme Court concluded that the prosecution had failed to exercise due diligence to prevent the witness from becoming absent. (*Id*. at pp. 989-993.)

Here, by contrast, after Thompson testified at defendant's preliminary hearing, the prosecution reasonably believed that she was going to cooperate. Admittedly, she had not cooperated prior to the preliminary hearing; the prosecution had had to have her arrested. After the preliminary hearing, however, she assured Guzman that she would cooperate in the future, because she did not want to be arrested again. Moreover, when he spoke to her on January 20 and again on January 26, 2009, to arrange for her to testify at the first trial, she seemed cooperative. Thus, the prosecution had no reason to do anything out of the ordinary to prevent her from becoming an absent witness.

We therefore conclude that the trial court did not err by ruling that the prosecution showed due diligence.

IV

THE VOLUNTARINESS OF THOMPSON'S STATEMENT TO THE LOUISIANA POLICE

Defendant contends that the trial court erred by admitting Thompson's statement to the Louisiana police, because it was coerced.

A. *Additional Factual Background.*

At the beginning of the interview, Louisiana Sheriff's Deputy Waggoner *Mirandized* Thompson. After obtaining some background information from her, including the fact that defendant was her boyfriend, he asked her to confirm that defendant was selling marijuana. She responded, "That's a lie." She said she would not have allowed that, "cause I have a baby. Why I want to put my life and my son life in jeopardy and I knew if y'all come running in, I'm going to jail and my son going to the state."

The deputy claimed that defendant had already admitted selling marijuana. He continued, "I'm not looking to do harm to your kids." "My business is not with them." "But there's certain things that you're telling me and that he told me something completely the opposite. . . . I'm not saying that he's not capable of lying because I very much believe that he is, but what I'm having a problem with is the things that he's telling me are things that he didn't have to tell me. Things that really kind of hurt him worse than it did help. And so it makes me think that maybe you're trying to cover . . . ."

Thompson continued to insist that she did not know that defendant was selling marijuana. The deputy then stated: "[Y]ou're going to make this hard on yourself. . . . I'm not in the habit of breaking up happy homes, but I can prove that you knew what was going on and . . . if we choose to put you in jail for this, you can go. You could have gone without me ever questioning you. . . . That is not my primary objective, but I will tell you this, I'm not going to sit here and let you continue to lie to me."

He went on: "I'm not that person that you need to lie to. I'm that person that you need to spill your soul to. . . . Because I control whether you go to jail or not. . . . I can prove that you knew what was going on there . . . . If I want you in jail that's where you'll go. You're not the primary person I want to put there. I don't care what you tell me about him, but it by God better be the truth, because if it's not, I will put you in jail . . . ."

Thompson then admitted knowing that defendant was selling marijuana. There was some discussion of that, which segued into a discussion of what Thompson knew about defendant's family, friends, and background. Thompson admitted hearing "people" say that defendant was wanted in "San Ardino" in California.

The deputy then said:

"Q: Well, I'm going to tell you everything that's already been in the paper. H[i]s name is Robert McKinney and he was wanted by San Bernardino Police Department for a homicide. Okay. Now I'm going to reintegrate this one more time to you. You keep leaving stuff out and you keep telling me lies and I'm fixing to put you in jail. . . . [H]im

going to jail the other night is something that's been on the news, this is how big of a deal it is, it's something that's been on the news from Monroe, Louisiana to California, okay.

"A: Uh huh.

"Q: This is some serious shit. This isn't some old bull shit . . . , this is pretty serious. You lying right now during an investigation is a crime and I'm telling you again, you're fixing to force me to put you in jail cause you're telling me shit that I know to be a lie because I've already had this same conversation with him. I know what you know. Now if this is the road that you want to go down that's fine, but you go to jail and you're getting taken away from your kids, okay. You've been harboring a fugitive for several months now. He's in jail and he's not getting out[,] okay. This guy had a whole another [*sic*] life that I know you knew he was wanted. Just listen.

"A: Okay.

"Q: I know you knew he was wanted. I know that you do know about certain family members. I know that you do know about some money and I know that you don't know about certain other things in his life cause there are certain things that he told me that he didn't tell you but those things I just mentioned along with a couple of other things, I'm not buying the shit I don't know, I don't know, I don't know. The answers that you answer right now are either going to put you back in handcuffs or let you walk out of here. But I'm really trying hard, it's really getting to me, having to sit here and decipher through the bull shit that you're trying to throw at me whenever I know the truth. I'm not going to ask you a question I don't know the answer to. So far you lied to me

eight times. I'm not going to ask you a question unless I already know the answer to it. . . . So one more time, the next time that I mark another mark down here that you've lied to me, I'm gonna get up I'm going to turn that tape recorder off, I'm gonna put you back in handcuffs and I'm gonna book you in to OCC.[8] And maybe when you're walking from the booking desk back to the door, because you want [*sic*] have a bond, because it's felony charges, you can wave at it. Okay. If that's what you want, then let's stay on this path of lying to me. He's not on your side, period. He's not on your side. [¶] . . . [¶]

" . . . He is done. The du[d]e will be lucky if he ever sees the light of day. He's through. Don't go down with him. That's crazy. You got kids, but you, you're heading that way. So are we going to start being honest with each other, or do we just need to go to OCC now and be done with this?

"A: I'm gonna be honest with you."[9]

Thompson then told the police that defendant had admitted shooting and killing someone in San Bernardino.

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[8] Presumably "OCC" meant the Ouachita Correctional Center. (See <http://www.opso.net/divisions/ouachita-correctional-center>, as of March 26, 2013.)

[9] Defendant claims that Thompson "initiated" her changed account by saying, "Okay. Ya'll want a story, you got a story," implying that she was lying. That is not entirely accurate. Rather, the first time she indicated that she was going to change her account was by saying, "I'm gonna be honest with you." The deputy responded by urging her to "[c]lear your consc[ience]" and to "start all over at the front." Only then did she say, "Ya'll want a story, you got a story."

B. *Additional Procedural Background*.

1. *The first trial*.

Before the first trial, defendant filed a motion in limine to exclude Thompson's statement to the Louisiana police, on the ground that it was involuntary and coerced. In support of the motion, he provided the court with a copy of the transcript of the interview.[10]

The trial court denied the motion. It explained that the deputy basically told Thompson that he wanted her to tell the truth; "[o]ther than that he doesn't tell her what he wants her to say." " . . . I don't think there's anything wrong with the police . . . saying look, you got to tell us the truth here; if you don't tell us the truth, you're going to go to jail and tell[ing] them what the consequences of them going to jail [are]; that it might affect your family life. I don't see there's anything wrong with that under the circumstances." "There's nothing in the transcript . . . that indicates they were coercing a particular statement from her."

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[10] The record includes both a redacted and unredacted transcript of the interview. It does not clearly indicate which one the trial court received. It seems most logical that it received the unredacted transcript. In his brief, however, defendant cites the redacted transcript. In any event, it does not appear that the redacted portions would have made any substantive difference.

2. *The second trial*.

Before the second trial, defendant filed an essentially identical motion in limine to exclude Thompson's statement as involuntary and coerced. After hearing argument, the trial court denied the motion, for essentially the same reasons as at the first trial.

3. *The third trial*.

Before the third trial, as mentioned earlier, defense counsel stated that he wanted to "incorporate" certain previous motions in limine, including the motion to exclude Thompson's statement. However, there was no argument on the motion, and the trial court never ruled on it.

C. *Analysis*.

1. *Forfeiture*.

Once again (see part II.C.1, *ante*), defense counsel forfeited this contention by failing to obtain a ruling on it before the third trial. (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1002; *People v. Ramirez*, *supra*, 39 Cal.4th at pp. 472-473.)

2. *Merits*.

And once again, we also reject this contention on the merits.

"The coerced testimony of a witness . . . is excluded in order to protect the defendant's own federal due process right to a fair trial, and in particular, to ensure the reliability of testimony offered against him." (*People v. Boyer* (2006) 38 Cal.4th 412, 444, italics omitted.)

"The statement of a . . . witness is coerced if it is the product of police conduct which overcomes the person's free will." (*People v. Lee* (2002) 95 Cal.App.4th 772, 782, fn. omitted.) """The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the [witness] were 'such as to overbear [the witness]'s will to resist and bring about confessions not freely self-determined.' [Citation.]" [Citation.] In determining whether or not [a witness]'s will was overborne, "an examination must be made of 'all the surrounding circumstances — both the characteristics of the [witness] and the details of the interrogation.' [Citation.]" [Citation.]' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 404.) "In evaluating the voluntariness of a statement, no single factor is dispositive. [Citation.]" (*People v. Williams*, *supra*, 49 Cal.4th at p. 436.)

"[W]hen a defendant makes a motion to exclude coerced testimony of a third party on due process grounds, the burden of proving improper coercion is upon the defendant. [Citation.]" (*People v. Badgett* (1995) 10 Cal.4th 330, 348.)

"On appeal, we independently review the entire record to determine whether a witness's testimony was coerced, so as to render the defendant's trial unfair. [Citation.] In doing so, however, we defer to the trial court's credibility determinations, and to its findings of physical and chronological fact, insofar as they are supported by substantial evidence." (*People v. Boyer*, *supra*, 38 Cal.4th at p. 444.)

Admittedly, the deputy was deceptive about some things. For example, he claimed that defendant had already told him the answers to the questions he was asking; as he

admitted at trial, this was not true. Defendant, however, does not complain that this made the interview coercive. It did not. "Deception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is '"'of a type reasonably likely to procure an untrue statement.'"' [Citations.]" (*People v. Williams, supra*, 49 Cal.4th at p. 443.) Here, the deception actually tended to procure a true statement.

Defendant argues that the deputy promised Thompson leniency. With regard to the *confession* of a *defendant*, the Supreme Court has stated, "'It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied.' [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 993.) However, "case law fails to support defendant's premise that a third party witness's statements are rendered inadmissible against a defendant if induced by improper offers of leniency. [Citations.]" (*People v. Ervin* (2000) 22 Cal.4th 48, 83.)

In *People v. Badgett*, *supra*, 10 Cal.4th 330, according to the defendants there, a police officer had communicated to a potential witness that she would be released from custody if she cooperated. The defendants argued that the witness's statements to police "were involuntary because they were the product of a promise of leniency." (*Id*. at p. 354.) The Supreme Court disagreed: "All immunized witnesses are offered some quid pro quo, usually an offer of leniency. We have never held, nor has any authority been offered in support of the proposition, that an offer of leniency in return for cooperation with the police renders a third party statement involuntary or eventual trial testimony coerced. . . . [T]estimony given under an immunity agreement does not violate the

defendant's right to a fair trial, if the grant of immunity is made on condition the witness testifies fully and fairly." (*Id.* at pp. 354-355.) "If an offer of immunity is not considered coercive, then an offer of release from custody in return for cooperation likewise should not render a witness's statement coerced." (*Id.* at p. 355.)

Defendant tries to distinguish *Badgett* on the ground that it dealt with a formal offer of immunity. Not so. As noted, *Badgett* actually involved one police officer's offer to release the witness from custody. *Badgett* relied on earlier cases involving formal immunity offers, but it then extended the same principles to an informal offer of release from custody.

We recognize that "[a]n immunity agreement that requires the witness to testify consistently with a previous statement to the police is deemed coercive, and testimony produced by such an agreement is subject to exclusion from evidence." (*People v. Badgett, supra,* 10 Cal.4th at p. 358.) However, "[i]t is . . . well established exhortations directed to the suspect or witness to 'tell the truth' are not objectionable." (*People v. Lee, supra,* 95 Cal.App.4th at p. 785, fn. omitted.) Here, as the trial court reasoned, the deputy was essentially urging Thompson to tell the truth. For example, he said, "I don't care what you tell me about [defendant], but it by God better be the truth, because if it's not, I will put you in jail . . . ." He claimed that he would know whether she was telling the truth or lying, explaining, " . . . I've already had this same conversation with [defendant]. I know what you know." However, he also conceded that there might be things she did not know, stating: " . . . I know that you don't know about certain other things in his life

cause there are certain things that he told me that he didn't tell you . . . ." Thus, she would not have felt pressured to claim knowledge that she did not have.

"'In assessing allegedly coercive police tactics, "[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." [Citation.]' [Citation.]" (*People v. Williams*, *supra*, 49 Cal.4th at p. 436.) The deputy's tactics in this case would not tend to produce an involuntary and unreliable statement.

Defendant also argues that the deputy threatened Thompson with the loss of her children.[11] Actually, it was Thompson who first brought up the possibility of losing custody of her children; she claimed she would not let defendant sell marijuana from her home, because that would mean "I'm going to jail and my son [is] going to the state." At

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[11] In this respect, defendant's account of the interrogation is somewhat misleading. He states: "When Thompson denied knowing anything about the sale of marijuana from her apartment, [the deputy] asked her if she had any children. [Citation.] He then advised her that he was *not looking to do any harm to her children . . . .*" (Original italics.) This makes it sound as if the deputy was making an implied threat — along the lines of, "Nice little place you have here, it'd be a shame if it got burned down."

Actually, Thompson had just volunteered that she had at least one child, to explain why she would not get involved in selling marijuana: " . . . I knew if ya'll come running in, I'm going to jail and my son [is] going to the state." The deputy then asked, "[Y]ou got three kids?" Thompson confirmed that she did. The deputy immediately said, "Okay. My business is not with them."

Thus, it is misleading to say that the deputy asked Thompson if she had children. She had just told him that she had one child, but apparently he believed (correctly) that she had three children; thus, he asked *how many* children she had. Moreover, his reassurance was apparently genuine; he was responding to the concern that Thompson had just expressed about losing them.

that point, the deputy tried to walk a fine line; he tried to reassure her, by saying it was not his intent to take her children away from her, while at the same time he could not promise that they would not be taken away, because she was a suspect in a criminal investigation. Thus, he said, "I'm not looking to do any harm to your kids." "My business is not with them." "I'm not in the habit of breaking up happy homes, but. . . if we choose to put you in jail for this, you can go."

Ultimately, however, he did say that, if she lied to him, she would be incarcerated and, as a result, she would lose custody of her children. He stated, "You lying right now during an investigation is a crime . . . . Now if this is the road that you want to go down that's fine, but you go to jail and you're getting taken away from your kids, okay." He also said, "Don't go down with [defendant]. That's crazy. You got kids, but you, you're heading that way."

Under *Badgett*, however, the police could legitimately offer Thompson leniency, because she was a witness and was not ultimately prosecuted. It would be absurd to allow police to offer a witness leniency, yet forbid them to mention the benefits that leniency would entail. If they can say, "Give us a statement, and we will release you from custody," then surely they can say, "Give us a statement, and you'll eat dinner at home tonight." Here, one of the benefits that Thompson would gain from leniency would be keeping custody of her children. Thompson had already brought the subject up herself. Thus, the deputy's references to this benefit were not unduly coercive.

As already mentioned, even when the police question a suspect, they can urge him or her to tell the truth. (*People v. Lee*, *supra*, 95 Cal.App.4th at p. 785.) Moreover, "'[i]n terms of assessing inducements assertedly offered to a suspect, "'[w]hen the benefit pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made. [Citation.]"' [Citation.]" (*People v. Tully*, *supra*, 54 Cal.4th at p. 993.) Here, by analogy, they could also point out the benefits that flowed naturally from a truthful and honest course of conduct. Because the police could legitimately offer Thompson leniency in exchange for the truth, these benefits included keeping custody of her children.

We therefore conclude that the trial court did not err by denying defendant's motion to exclude Thompson's statements.

V

THE MYSPACE PAGES

Defendant contends that the trial court erred by admitting certain pages downloaded from MySpace.

A. *Additional Factual and Procedural Background.*

1. *Proceedings in limine.*

Before the third trial, there was a discussion of "the MySpace issues . . . ." The trial court ruled, "Foundation has to be laid that would . . . at least get over the initial hurdle of the authenticity of the document or the website itself. And if any evidence is submitted in that regard, I'll make a determination as to whether or not it reaches that

foundational hurdle. Obviously raise whatever objection you have [to] foundation at the time that the testimony comes in . . . ."

Defendant also objected to "hav[ing] the expert . . . interpreting what these writings on the internet are." He cited Evidence Code section 352.

During trial, defense counsel remarked, "[W]e should probably put our chambers conference on the record." He indicated that, in chambers, he had objected to Exhibits 27 and 28 based on lack of authentication and Evidence Code section 352. Exhibit 27 was a downloaded copy of the home page of what was allegedly defendant's MySpace account. Exhibit 28 was a downloaded copy of the photos from same account.

The trial court responded, "I already made a ruling that it's relevant and . . . can go in. It's just a question under 352 whether it should be cut down in some fashion." It invited defense counsel to bring a motion to exclude particular "portions" or "items" as cumulative.

The next day, defense counsel objected to the MySpace pages in their entirety based on Evidence Code section 352. He also stated, "[T]he authenticity of these . . . is very weak which I think goes towards their probative value . . . ."

The trial court ruled, "I'm going to allow it. I think that . . . the prejudicial nature of it does not substantially outweigh its probative value. If there's some areas being brought up you feel go beyond or [are] cumulative in nature, make appropriate objections."

2. *Testimony concerning the MySpace pages.*

The gang expert, Sergeant Travis Walker, testified that defendant was a member of 18th Street Maze, with the moniker "Lil Gotti."

Sergeant Walker had found a MySpace page under the username "Lil Gotti." By means of a search warrant, he obtained records relating to the account from MySpace. The user's last name was listed as "Maze gang." The user was listed as male, with the same birth date as defendant. The user's email address was listed as LilgottieIEmaze@yahoo.com. The user's welcome message addressed him as "Robert."

An email sent from the account stated, "Damn man. You still don't know who this is. This Lil Gottie AKA. You know me as Robert."

In December 2006, Michael Johnson, a/k/a "Lil Mike," an associate of 18th Street Maze, was shot and killed, apparently by members of the Little Zion Manor gang. In his memory, defendant got a tattoo reading, "RIP Michael."

On January 3, 2007, an email from the MySpace account stated, "Shit right now I'm on vacation in Louisiana with my folks . . . . [W]e got to put it down for Lil Mike R.I.P. . . . I'm chillin' for a minute . . . but . . . I'll be out there in a few weeks dog. Stay up and maze up."

On February 7, 2007, Edward Griffin, a/k/a "Lil 9," a member of 18th Street Maze, was killed, apparently by members of the Little Zion Manor gang. In his memory, defendant got a tattoo reading, "RIP Edward." Griffin's funeral was held on or about February 20, 2007.

On February 23, 2007, an email from the MySpace account to another 18th Street Maze member stated, "Tell my niggas yo boy will be out there real soon, . . . so I can tear up some shi[t] for my nigga Lil 9. May he R.I.P. and ooohh whoooop in peace. . . . Tell the homies I said oohh hoop su hoop maze gang banging . . . . Holla 18th maze life."

Sergeant Walker explained that "su whooop" is a "hood call" used by Blood gangs. "Oohh whooop" is the hood call of 18th Street Maze. "[T]ear[ing] up some shit" meant putting in work for the gang, which could include a retaliatory shooting.

Another February 23, 2007, email from the MySpace account said, "[J]ust chilling, waiting to get on the fucking bus to come back to the [']dino and put it down for my young nigga, Lil 9. May he R.I.P. an['] oohh whooop in peace."

In August 2007, the username on the account was changed to "ebk lzk o5k gsk msk mk." Sergeant Walker testified that this stood for "everybody killer," "Little Zion killer," "Five Times [k]iller," "Gilbert Street killer," "Magnolia States killer," and "Macon killer."

The MySpace pages included photos of 18th Street Maze members, some throwing gang signs. They also included gang slogans and other indicia of gang membership. The top of the home page said, among other things, "DHBK," which Sergeant Walker testified stood for "Delmann Heights Blood killer." However, the MySpace pages did not include any photos of defendant.

According to Sergeant Walker, a MySpace page can be changed only by the creator of the account or by someone to whom the creator gives the login name and password.

When the prosecution offered Exhibits 27 and 28 into evidence, defense counsel did not object.[12]

B. *Analysis*.

1. *Forfeiture*.

Defense counsel forfeited any contention that the MySpace pages were not sufficiently authenticated by failing to object on this ground during or after Sergeant Walker's testimony. The trial court expressly refused to rule on this issue in limine; it told defense counsel, "[R]aise whatever objection you have [to] foundation at the time that the testimony comes in . . . ." Defense counsel did not do so. Hence, this objection has been forfeited for appeal. (Evid. Code, § 353, subd. (a).)

2. *Merits*.

We also reject on the merits the claim that the MySpace pages were not sufficiently authenticated.

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[12] Defense counsel also never objected to Sergeant Walker's testimony about emails to and from the MySpace account. Defendant does not appear to argue that these emails were improperly admitted. We deem any such contention forfeited.

A writing must be authenticated before it can be received in evidence. (Evid. Code, § 1401.) This means the proponent must demonstrate that the writing is what "the proponent of the evidence claims it is . . . ." (Evid. Code, § 1400.)

"[A] writing can be authenticated by circumstantial evidence and by its contents. [Citations.]" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187.) "As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility. [Citations.]" (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.)

We review a ruling that a writing has been sufficiently authenticated for abuse of discretion. (*People v. Smith* (2009) 179 Cal.App.4th 986, 1001; *People v. Daugherty* (2011) 199 Cal.App.4th Supp. 1, 5-6.)

In *People v. Olguin* (1994) 31 Cal.App.4th 1355, the police found rap lyrics in a defendant's home. (*Id*. at p. 1372.) They referred to membership in the Southside F Troop gang; the defendant was a member of this gang. (*Id*. at pp. 1366, 1372 & fn. 3.) One said, "my name is Vamp," which was the defendant's moniker. (*Id*. at p. 1372 & fn. 3.) Another said, "I[']m that rapper they call Franky"; the defendant's name was Francisco. (*Ibid*.) Finally, they said "I rapp [*sic*] into the beat" and "just give me the mic and I[']ll rock your world," which could have been construed as references to disk-jockeying; the defendant was a part-time disk jockey. (*Ibid*.) For these reasons, the

appellate court upheld a ruling that the lyrics were sufficiently authenticated. (*Id.* at pp. 1372-1373.)

In *People v. Gibson* (2001) 90 Cal.App.4th 371, the police found two manuscripts, one in the defendant's home and one in her hotel room. (*Id*. at p. 382.) They referred to the author as "Sasha," which was one of the defendant's aliases. (*Id*. at p. 383.) "Each was written in the first person and each described operating a prostitution enterprise"; there was extrinsic evidence that the defendant was operating a prostitution enterprise. (*Id*. at pp. 382-383.) For these reasons, the appellate court upheld a ruling that the manuscripts were sufficiently authenticated. (*Ibid*.)

Here, much as in *Olguin* and *Gibson*, the author of the MySpace pages had identifying information that matched defendant's. The author called himself Robert and Lil Gotti. He had the same birth date as defendant. He claimed 18th Street Maze. Sergeant Walker testified that defendant was a member of the 18th Street Maze; in rendering that opinion, he did not purport to rely on the MySpace pages.[13] The author was informed about and interested in the recent murders of Lil Mike and Lil 9; defendant

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[13] Defendant complains that the factual basis for Sergeant Walker's opinion that he was a gang member was weak: " . . . Sergeant Walker testified there were no field identification contacts with appellant and thus, other than to identify him as an 18th Street gang member through his tattoos, Sergeant Walker appeared to know nothing about appellant's interests."

Defendant, however, never objected to this opinion at trial. Even on appeal, he does not argue that it was inadmissible or not supported by a sufficient (albeit weak) factual basis.

had tattoos commemorating them. On January 3, 2007, the author was in Louisiana; in December 2006, Thompson met defendant in Louisiana. The author took a bus back to San Bernardino; after the shooting, defendant fled by bus from San Bernardino back to Louisiana. This was sufficient to support the trial court's finding of authentication.

Admittedly, unlike in *Olguin* and *Gibson*, the writing was not found in defendant's residence. Even if it had been, however, that fact alone would not be sufficient authentication; typically, a person is not the author of every writing found in his or her home, or even of most of them. While it would be helpful additional evidence, it is not a controlling factor.

"We recognize, of course, that hacking may occur and that documents and other material on the Internet may not be what they seem. But the proponent's threshold authentication burden for admissibility is *not* to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could conclude the proffered writing is authentic. The prosecution met that burden here, as the trial court properly concluded." (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1436-1437.)

Defendant also argues that the trial court erred by overruling his objection that the MySpace pages were more prejudicial than probative.

The MySpace pages were probative in two ways. First, they tended to confirm Sergeant Walker's opinion that defendant was a member of 18th Street Maze. Defendant argues, "To the extent received for this purpose, however, the MySpace pages were

cumulative of other less inflammatory evidence, such as appellant's . . . tattoos." Elsewhere, however, as already noted (see fn. 13, *ante*, pp. 42-43), defendant complains that Sergeant Walker's opinion was unconvincing because it was based solely on his tattoos. Defendant cannot have it both ways. Precisely because Sergeant Walker's opinion had weak (though adequate) support, any additional evidence supporting it had substantial probative value.

Second, however, the MySpace pages also tended to show motive. They demonstrated that defendant saw himself as a killer of members of rival gangs, including a "Little Zion killer" and a "Delmann Heights Blood killer." Both of the victims were affiliated with the Delmann Heights gang. Moreover, they were on the boundary of a Little Zion area, and Ojomoh was wearing red, which was the Little Zion color. Finally, emails from the MySpace account indicated that defendant was looking for an opportunity to "put it down" for Michael Johnson and Edward Griffin, fellow gang members who had recently been killed. Defendant's motive, in turn, was relevant to prove the gang enhancements — that the crimes were committed for the benefit of the gang and with the specific intent to promote, further, or assist in criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b)(1).)

In addition to being significantly probative, the MySpace pages were not particularly prejudicial. "Given the extensive other evidence of defendant's . . . gang membership and of [the gang]'s activities, defendant's claim that the handful of gang-related exhibits he now challenges created 'a substantial danger of undue prejudice'

within the meaning of Evidence Code section 352 — i.e., the challenged evidence '"*uniquely* tend[ed] to evoke an emotional bias against defendant as an individual"' [citation] — is untenable. Defendant's claim under Evidence Code section 352 therefore fails. [Citations.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 134.)

"[I]n the absence of any error under Evidence Code section 352, we also reject defendant's . . . constitutional claim[]. The routine and proper application of state evidentiary law does not impinge on a defendant's due process rights. [Citation.]" (*People v. Riccardi* (2012) 54 Cal.4th 758, 809.)

VI

THE SUFFICIENCY OF THE EVIDENCE

OF THE GANG'S "PRIMARY ACTIVITIES"

Defendant contends that there was insufficient evidence of the "primary activities" element of the gang enhancements.

"In reviewing a criminal conviction challenged as lacking evidentiary support, '"the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 241.)

"We '"'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" [Citation.]' [Citation.]" (*People v. Clark*

(2011) 52 Cal.4th 856, 943.) "'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

"When the circumstances reasonably justify the jury's findings, a reviewing court's opinion that the circumstances might also be reasonably reconciled with contrary findings does not warrant reversal of the judgment. [Citation.]" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.)

A gang enhancement requires, among other things, that the alleged gang's "primary activities" include the commission of enumerated criminal acts. (Pen. Code, § 186.22, subd. (f).) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group's 'chief' or 'principal" occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v.*]

Gardeley [(1996) 14 Cal.4th 605]." (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

In *Gardeley*, a gang expert testified that in "his expert opinion . . . the primary activity of the Family Crip gang was the sale of narcotics, but that the gang also engaged in witness intimidation. . . . [He] based this opinion on conversations with the defendants and with other Family Crip members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 620.) The Supreme Court held that "this testimony . . . provided a basis from which the jury could reasonably find that the Family Crip gang met the requirements of subdivision (f) of [Penal Code] section 186.22 for a criminal street gang," including the "primary activities" element. (*Ibid.*)

As the Supreme Court indicated in *Sengpadychith*, expert testimony and evidence of the commission of specific crimes are *alternative* ways of proving the primary activities element. Thus, when appellate courts have held that there was insufficient evidence of specific crimes to prove the primary activities element, they have been careful to note that there *also* was no expert testimony about the gang's primary activities. (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 612 [gang expert "did not directly testify that criminal activities constituted Varrio Viejo's primary activities"]; *People v. Perez* (2004) 118 Cal.App.4th 151, 160 ["[n]o expert testimony such as that provided in [*Gardeley*] was elicited here"]; *In re Jorge G.* (2004) 117 Cal.App.4th 931, 945 ["[w]e recognize that

a gang's primary activities may be shown though expert testimony [citations]; however, no expert testimony was presented on this subject"].)

Here, the gang expert testified that the primary activities of 18th Street Maze included murder, attempted murder, and assault with a deadly weapon. These are crimes that can satisfy the primary activities element. (Pen. Code, § 186.22, subd. (e)(1), (3).)[14] He had received field training about gangs in San Bernardino, including "crimes that they were involved in . . . ." He had personally investigated drug trafficking by Black street gangs, and he had obtained information about "criminal activity" from informants. Finally, he had "gain[ed] a lot of knowledge" — specifically including knowledge about the primary activities of various gangs — by talking to gang members. He had testified as a gang expert in San Bernardino "probably in excess of 300 times," which means he must have been familiar with at least 300 allegedly gang-related crimes. Under *Sengpadychith* and *Gardeley*, this testimony was sufficient to support the jury's true finding on the gang enhancements. (See also *People v. Martinez* (2008) 158 Cal.App.4th 1324 [gang expert's "eight years dealing with the gang, including investigations and personal conversations with members, and reviews of reports suffices to establish the foundation for his testimony" regarding gang's primary activities].)

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[14] The gang expert testified that the gang's primary activities also included witness intimidation and drug sales. These crimes, too, can satisfy the "primary activities" element. (Pen. Code, § 186.22, subd. (e)(4), (8).) However, the jury was not so instructed. Rather, it was instructed to consider only murder, attempted murder, and assault with a deadly weapon.

Defendant asserts that "[e]xpert opinion testimony, standing alone, is not sufficient to prove that an offense is gang related," citing *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931. However, whether a crime is "gang-related" — or, more specifically, whether it was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (Pen. Code, § 186.22, subd. (b)(1)) — is different from what an alleged gang's primary activities are. In *Gardeley*, the Supreme Court held squarely that expert opinion testimony *is* sufficient to prove the primary activities element. This holding is binding on us.

Defendant also relies on *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179. *Mejia*, however, was decided under Federal Rule of Evidence 702, not the California Evidence Code. (*Mejia*, at pp. 194-196.) Moreover, it is not binding on us. (*People v. Williams* (1997) 16 Cal.4th 153, 190.) Finally, to the extent that it conflicts with *Gardeley*, it is not even persuasive; we must follow *Gardeley*.

VII

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.